Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

STATE OF NEW HAMPSHIRE, DEPARTMENT OF HEALTH & HUMAN SERVICES,

Petitioner,

v.

ESTATE OF GERALDINE A. RADUAZO,

Respondent.

On Petition For A Writ Of Certiorari To The New Hampshire Supreme Court

PETITION FOR WRIT OF CERTIORARI

PETER W. HEED
Attorney General

CRAIG S. DONAIS*
Assistant Attorney General
N.H. DEPARTMENT OF JUSTICE
33 Capitol Street
Concord, NH 03301
603-271-3675

Attorneys for Petitioner
**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTIONS PRESENTED FOR REVIEW

The State of New Hampshire pursued litigation against the tobacco industry along with forty-five other states, leading to the nationwide Master Settlement Agreement in November 1998. In May 1999, Congress enacted 42 U.S.C. § 1396b(d)(3)(B), declaring that the Master Settlement Agreement proceeds are not Medicaid recoveries, and states can use these funds in any way deemed appropriate.

The questions presented are:

1. Does 42 U.S.C. § 1396b(d)(3)(B) prohibit individual Medicaid recipients from claiming that monies received by the State under the Master Settlement Agreement satisfy Medicaid claims recoverable pursuant to 42 U.S.C. § 1396p(b)?

2. May the New Hampshire Supreme Court restrict the State's obligation to comply with 42 U.S.C. § 1396p(b) by ordering the release of a valid Medicaid lien securing the State and federal funds expended on a Medicaid recipient?

PARTIES TO THE PROCEEDING IN THE COURT BELOW

Petitioner is the State of New Hampshire, Department of Health & Human Services. N.H. Rev. Stat. Ann. (RSA) Chapter 126-A.

Respondent is the Estate of Geraldine A. Raduazo. The decedent was a citizen of the State of New Hampshire. Prior to her death, she received Medicaid assistance under the program administered by the State of New Hampshire.

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PETITION FOR A WRIT OF CERTIORARI

The State of New Hampshire prays that a Writ of *Certiorari* issue to the New Hampshire Supreme Court to review the judgment in this case filed on January 22, 2003.

OPINIONS BELOW

The opinion of the New Hampshire Supreme Court is reported at 814 A.2d 147 (N.H. 2002). It is set forth in the Appendix at App. 1 to App. 24. The Order of the New Hampshire Supreme Court denying the State's motion for reconsideration is unpublished, and is set forth in the Appendix at App. 31. The Order of the Rockingham County Probate Court granting the State's Motion for Summary Judgment and dismissing the Respondent's petition is unpublished, and is set forth in the Appendix at App. 25 to App. 30.

STATEMENT OF JURISDICTION

The judgment of the New Hampshire Supreme Court was entered on December 18, 2002. The State's motion for reconsideration was denied on January 22, 2003.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a) (2002) to review a civil judgment.

STATUTES INVOLVED

Title XIX of the Social Security Act, 42 U.S.C. § 1396b(d)(3)(B) states, in pertinent part:

> (i) Subparagraph (A) and paragraph (2)(B) shall not apply to any amount recovered or paid to a State as part of the comprehensive settlement of November 1998 between manufacturers of tobacco products, as defined in section 5702(d) of the Internal Revenue Code of 1986, and State Attorneys General, or as part of any individual State settlement or judgment reached in litigation initiated or pursued by a State against one or more such manufacturers.
>
> (ii) Except as provided in subsection (i)(19) of this section, a State may use amounts recovered or paid to the State as part of a comprehensive or individual settlement, or a judgment, described in clause (i) for any expenditures determined appropriate by the State.

Title XIX of the Social Security Act, 42 U.S.C. § 1396k provides, in relevant part:

> (a) For the purpose of assisting in the collection of medical support payments and other payments for medical care owed to recipients of medical assistance under the State plan approved under this title, a State plan for medical assistance shall –
>
> (1) provide that, as a condition of eligibility for medical assistance under the State plan to an individual who has the legal capacity to execute an assignment for himself, the individual is required –
>
> (A) to assign the State any rights, of the individual or of any other person who is eligible for medical assistance under this title and on whose

behalf the individual has the legal authority to execute an assignment of such rights, to support (specified as support for the purpose of medical care by a court or administrative order) and to payment for medical care from any third party; . . .

(b) Such part of any amount collected by the State under an assignment made under the provisions of this section shall be retained by the State as is necessary to reimburse it for medical assistance payments made on behalf of an individual with respect to whom such assignment was executed (with appropriate reimbursement of the Federal Government to the extent of its participation in the financing of such medical assistance), and the remainder of such amount collected shall be paid to such individual.

Title XIX of the Social Security Act, 42 U.S.C. § 1396p(b) provides, in relevant part:

(1) No adjustment or recovery of any medical assistance correctly paid on behalf of an individual under the State plan may be made, except that the State shall seek adjustment or recovery of any medical assistance correctly paid on behalf of an individual under the State plan in the case of the following individuals:

(A) In the case of an individual described in subsection (a)(1)(B) of this section, the State shall seek adjustment or recovery from the individual's estate or upon sale of the property subject to a lien imposed on account of medical assistance paid on behalf of the individual.

(B) In the case of an individual who was 55 years of age or older when the individual received such medical assistance, the State shall

seek adjustment or recovery from the individual's estate, but only for medical assistance consisting of –

(i) nursing facility services, home and community-based services, and related hospital and prescription drug services, or

(ii) at the option of the State, any items or services under the State plan.

(C) (i) In the case of an individual who has received (or is entitled to receive) benefits under a long-term care insurance policy in connection with which assets or resources are disregarded in the manner described in clause (ii), except as provided in such clause, the State shall seek adjustment or recovery from the individual's estate on account of medical assistance paid on behalf of the individual for nursing facility and other long-term care services.

STATEMENT OF THE CASE

The New Hampshire Supreme Court reversed the Rockingham County Probate Court, ordering release of a valid Medicaid lien securing State and federal funds expended on the Respondent's medical care. The court's order violates 42 U.S.C. § 1396p(b) by ignoring Congress' directive in 42 U.S.C. § 1396b(d)(3)(B) that excludes payments to the states under the Master Settlement Agreement (MSA) from the Medicaid system. Further, the New Hampshire Supreme Court ignored the sound judgment of nine Circuit Courts of Appeals, which have all held that Medicaid recipients may not financially benefit from the MSA.

I. The Tobacco Litigation and the Master Settlement Agreement.

In 1997, the State filed a lawsuit against major tobacco companies. The State alleged that the companies had committed deceitful practices in violation of State laws, and based its claim upon various theories. *See* App. 5-6. The State sought both damages and injunctive relief, including a request that the companies disclose all research pertaining to the health effects of tobacco use, take affirmative steps to prevent the distribution of tobacco products to children, and disclose the nicotine content of tobacco products. The State also sought damages, including restitution, enhanced compensatory damages, disgorgement of the profits from the sale of tobacco products, and compensation for the State's medical costs. Other states filed similar actions against the tobacco defendants.

In November 1998, the State, along with forty-five other states and six territories, entered into the MSA with the tobacco defendants. The MSA resolved the claims against the tobacco defendants. Under the MSA, the State will receive a stream of payments valued at approximately $1.304 billion over twenty-five years.

II. The Medicaid Statutes in Title XIX of the Social Security Act.

In 1993, Congress amended 42 U.S.C. § 1396p(b)[1], the Medicaid estate recovery provision, converting the State's estate recovery program from optional to mandatory, and

[1] All statutory references within the Petition refer to Title 42, United States Code.

requiring reimbursement to the federal government for its expenditures. *See* P.L. 103-66, 107 Stat. 312, 627-28 (codified at § 1396p(b)(1)). As amended, § 1396p(b) identified those estates subject to mandatory estate recoveries, identifying specific exceptions. Under § 1396p(b), states engaged in the estate recovery process recover funds from estates, and allocate each estate recovery to the state and federal government's expenditures as originally funded by the state and federal government. The allocation formula provides that state and federal governments share on a percentage basis in the total recovery, with both benefiting from large recoveries, and equally sharing in diminished recoveries. This provision has not changed since 1993.

"The ink on the [MSA] was barely dry" when groups of Medicaid recipients began flooding the courts with claims that they were entitled to the "excess" money recovered by the states. *State of California v. Superior Court*, 83 Cal. App. 4th 597, 99 Cal. Rptr. 735 (Ct. App., 2nd Dist. 2000). The foundation for the argument uniformly advanced by Medicaid recipients was their alleged right under § 1396k to a share of the settlement proceeds.

Section 1396k addresses the reality that sometimes "third parties are liable for the health-care expenses of Medicaid patients, through, for example, insurance, tort liability, or a court order based on familial obligation." *Strawser v. Atkins*, 290 F.3d 720, 724 (4th Cir.), *cert. den.*, 123 S. Ct. 618 (2002). To obtain federal assistance under Medicaid, states are mandated to require that Medicaid recipients "assign any rights they possess against such third parties to the state," and states "must make reasonable efforts to collect on all third-party claims that are assigned." *Id.* If a state recovers under an assigned claim, payment from third parties go first to the state to cover its

Medicaid expenses, then to the federal government to cover its expenses, and, finally, if any funds remain, to the Medicaid recipient who assigned the claim. § 1396k(b).

Just as Medicaid recipients were gearing up their pursuit of a share of the settlement proceeds, Congress was debating "whether payments under the MSA to Settling States were covered by the Medicaid Act, in which case the federal government would have a claim to a portion of those funds." *Tyler v. Douglas*, 280 F.3d 116, 120 (2nd Cir. 2001). To resolve the uncertainty about the legal status of the MSA funds, Congress enacted § 1396b(d)(3)(B) as part of a rider to the Emergency Supplemental Appropriations Act of 1999, P.L. 106-31, 113 Stat. 57, 103-04. Clause (i) served specifically to exempt the MSA funds from being treated as Medicaid overpayments.[2] Clause (ii) separately authorized states to use these funds "for any expenditures determined appropriate by the State."[3] Any possible relationship between the MSA funds and Medicaid expenditures was resolved by § 1396b(d)(3)(B).

III. Factual and Procedural Background.

The Respondent began receiving Medicaid benefits on March 1, 1983. When Congress mandated estate recoveries in 1993, five years before the State entered into the MSA, the Respondent owned her personal residence. In

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[2] Subparagraph (A) and paragraph (2)(B) referenced in clause (i) identify the standard allocation rules applicable to estate recoveries.

[3] Subsection (i)(19) referenced in clause (ii) identifies funds for amount expended on administrative costs to initiate or pursue litigation.

choosing to continue as a Medicaid recipient, the Respondent's property became subject to the estate recovery requirements of § 1396p(b). The Respondent died on December 31, 1997, and administration of her estate commenced in the Rockingham County Probate Court. At the Respondent's death, the State and federal government filed a post-mortem lien to recover the $169,765.16 expended toward her medical expenses. The sale of her home resulted in approximately $60,000 to satisfy the Medicaid lien, to be allocated to New Hampshire and the federal government on an equal basis.

In February 2000, the Respondent petitioned to release the State's Medicaid lien on the premise that the MSA fully satisfied the Medicaid lien, and, therefore, it must be released based on "justice, equity and general principles of subrogation." The State filed a motion to dismiss the Respondent's claim on the ground that it was barred by sovereign immunity, and on various other State and federal law theories. On December 19, 2001, the probate court granted the State's motion, finding that the claim was barred by sovereign immunity.

The Respondent appealed to the New Hampshire Supreme Court, which reversed in a split decision. The court ruled that § 1396b(d)(3)(B) did not apply. Justice Duggan issued a strong dissent, concluding that the State's MSA funds did not relieve the Estate of its reimbursement obligations.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted in this case because the New Hampshire Supreme Court decided an important

question of federal law in conflict with the decisions of numerous United States Circuit Courts of Appeal.

I. The New Hampshire Supreme Court's Ruling Conflicts with Decisions of Numerous Federal Courts of Appeals, Including the First Circuit.

In a split decision, the New Hampshire Supreme Court expressly rejected the argument that Congress' enactment of § 1396b(d)(3)(B) exempts MSA funds from any and all Medicaid claims and recoveries. The court attempted to distinguish numerous decisions from the Circuit Courts of Appeals, which held that Medicaid recipients were precluded from receiving any MSA funds. "Regardless of the reasoning set forth in these cases, they do not apply. In this case, the Estate is not seeking a portion of the tobacco settlement in excess of the amount the State paid to Medicaid recipients for tobacco-related illnesses pursuant to the federal statutory scheme." App. 16.

The court rejected the State's argument that the MSA did not resolve any assigned claims of Medicaid recipients. The court found that when the State (and, ostensibly, the other settling states and territories) entered into the MSA, it "stepped into the shoes" of Medicaid recipients who smoked and obtained their recoveries based upon these assigned causes of action. App. 13. As a result, "the State divested Medicaid recipients suffering from tobacco-related illnesses of their right to pursue health care costs" covered by Medicaid. *Id.* The court remanded to determine the amount recovered by the State under the MSA on behalf of Raduazo, and to offset the Respondent's lien in light of her alleged tobacco-related illnesses. *Id.* at 17. The State also argued that, even if there was an assignment

under State law, § 1396b(d)(3)(B) precluded any allocation of MSA funds to Medicaid recipients.

Under the court's decision, the State must release valid Medicaid liens, including the federal government's share of mandated estate recoveries under § 1396p(b), because the court perceived the State's MSA recovery to be Medicaid-related, a result expressly precluded by § 1396b(d)(3)(B). The court's directive to release a portion of the lien prevents proper administration of the Medicaid system as mandated by federal law, and adversely impacts the State and federal government's receipt of funds from estate recoveries, in direct contravention of federal law.

Prior to the New Hampshire Supreme Court's decision, every federal Circuit Court confronted with Medicaid recipient suits targeting the MSA concluded that Medicaid recipients were not entitled to financially benefit from the MSA. *See Greenless v. Almond,* 277 F.3d. 601, 608 (1st Cir.) *cert. den.*, 123 S. Ct. 75 (2002); *Tyler*, 280 F.3d 116, 117-18, 123 (2nd Cir. 2001), *cert. den.*, 122 S. Ct. 2361 (2002); *Strawser,* 290 F.3d at 720; *Watson v. Texas*, 261 F.3d 436, 444 (5th Cir. 2001); *Barton v. Summers*, 293 F.3d 944, 955 (6th Cir. 2002); *Floyd v. Thompson*, 227 F.3d 1029, 1037 (7th Cir. 2000); *Cardenas v. Anzai*, 311 F.3d 929, 940 (9th Cir. 2002); *Anderson v. Willden*, 314 F.3d 1004, 1005-06 (9th Cir. 2002); *Harris v. Owens*, 264 F.3d 1282, 1285-87, 1295 (10th Cir. 2001), *cert. den.*, 122 S. Ct. 2294 (2002); *McClendon v. Georgia Dept. of Community Health*, 261 F.3d 1252, 1255, 1261 (11th Cir. 2001).

In *Greenless*, Medicaid recipients challenged Rhode Island's receipt of MSA funds, claiming an entitlement to share in the proceeds. *Greenless*, 277 F.3d at 603. The Court cited the normal Medicaid distribution rules, *id.* at

604, but acknowledged that § 1396b(d)(3)(B) changed the normal rules. The mandates in clause (ii) were incompatible with any determination that MSA funds are "simultaneously owed to Medicaid recipients." *Greenless*, 277 F.3d at 608. Accordingly, the claim was precluded. *Id.*

The First Circuit relied upon § 1396b(d)(3)(B) to dismiss the Medicaid claims. The New Hampshire Supreme Court found the First Circuit's rationale "unpersuasive," noting that those claims related to settlement proceeds "that *exceeded* the amount the State had paid for their tobacco-related injuries." App. 9 (emphasis in original). The irreconcilable conflict between the State and our Circuit creates confusion because the outcome will depend on which court the action is filed in, leaving the status of the law unclear.

The New Hampshire Supreme Court identified what it perceived as a distinction between the above-cited cases and the issue before it. The court observed that the Medicaid recipients in those cases sought amounts in excess of the state's expenditures; in contrast, the Respondent was merely seeking a credit or offset because the MSA allegedly provided the State with money expended for the Respondent's care. App. 15. The court noted that different rationales existed among the federal appellate courts concerning the impact of the MSA on individual Medicaid recipients. The scope of § 1396b(d)(3)(B) makes clear that the court was relying upon a distinction without a difference. *See infra*, Section II.A.

The distinction hinges on whether the MSA incorporated assigned claims of Medicaid recipients. The court concluded that its decision was "not inconsistent" with those courts that, in dicta, contemplated the MSA may

have been premised in part upon assigned claims. *Id.*[4] The court found "unpersuasive" the reasoning of those courts that held that "no part of the tobacco litigation was premised upon an assignment of rights." *Id.* The court determined that the MSA resolved Medicaid recipients' assigned claims; therefore, the "State is barred from collecting that money a second time from the recipient's estate." App. 16.

The State's position was squarely vindicated in back-to-back decisions from the Ninth Circuit. First, in *Cardenas v. Anzai*, the Ninth Circuit held that § 1396b(d)(3)(B)(ii) bars plaintiffs' claims to excess funds since the statute frees states "from complying with the ordinary Medicaid disbursement provisions of § 1396k(b)," and allows states to use MSA money for any purposes as the state sees fit. *Cardenas*, 311 F.3d at 940. One month later, the court decided *Anderson v. Willden*, emphatically holding that § 1396b(d)(3)(B)(ii) barred Medicaid recipient claims exactly like the Respondent's that merely seek *"a setoff against the debt otherwise owed by the plaintiffs' estates. . . . "* *Anderson*, 314 F.3d at 1005. (emphasis added). The New Hampshire Supreme Court's decision stands in direct conflict with *Anderson*, and the rationale of numerous Circuit Courts of Appeals, on an important issue of federal law.

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[4] Most circuit courts did not address assignment issues because they held that § 1396b(d)(3)(B) foreclosed Medicaid recipients from making claims in reliance on § 1396k. *See, e.g., Greenless*, 277 F.3d at 608; *Tyler*, 280 F.3d at 117-18; *Strawser*, 290 F.3d at 734.

II. The New Hampshire Supreme Court's Ruling Misconstrued Title XIX of the Social Security Act.

Certiorari should also be granted because the New Hampshire Supreme Court failed to recognize Congress' determination that the money received from the MSA is not Medicaid-related. The court rejected the State's argument that § 1396b(d)(3)(B) precluded the Estate from seeking a setoff based on the MSA.

A. Section 1396b(d)(3)(B) Precludes Any Allocation, Setoff, or Release of MSA Funds to Medicaid Recipients.

Congress declared that MSA payments are a non-Medicaid recovery by the states, and, therefore, not subject to Medicaid reimbursement rules. Most importantly, all money received by a State under the MSA may be spent in any way each State determines appropriate. Section 1396b(d)(3)(B)(ii); *see State of California*, 83 Cal. App. 4th 597, 99 Cal. Rptr. 735; *Harris,* 264 F.3d at 1295. Notably, § 1396b(d)(3)(B)(ii) has never been interpreted as exempting states from mandatory estate recoveries under § 1396p(b), or releasing the state and federal government's right to reimbursement on a valid Medicaid claim. All states remain obligated to pursue estate recoveries under federal law, notwithstanding the fact that they may receive MSA payments.

The State argued that § 1396b(d)(3)(B)(ii) precluded a finding that individual Medicaid recipients are entitled to any financial benefit from the MSA. Clause (ii) authorized the settling states to retain the settlement funds to be used "for any expenditures determined appropriate by the State." As the First Circuit noted, the language in clause

(ii) cannot be reconciled with a finding that the funds are "simultaneously owed to Medicaid recipients." *Greenless*, 277 F.3d at 608. Yet, that is precisely what the New Hampshire Supreme Court held – MSA funds must be substituted for the Medicaid recipient's assets separately preserved for reimbursement under § 1396p(b). Congress intended States to retain control over all MSA funds, and clearly did not intend to abrogate, release, or implicitly repeal the state and federal government's right to estate recoveries under § 1396p(b) by adoption of § 1396b(d)(3)(B). The court's decision results in a substantial financial benefit to Medicaid recipients' heirs because, under the court's theory, the MSA funds satisfied the State's estate recovery obligation under federal law. Heirs can inherit assets free and clear of § 1396p(b), violating the unequivocal mandate of clause (ii), and resulting in a substantial loss of recoverable funds to the State and federal government.

B. Even if § 1396b(d)(3)(B) Does Not Apply, § 1396p(b) Requires States to Pursue Estate Recovery Against the Respondent.

Congress has compelled mandatory estate recoveries since 1993, long before the tobacco litigation. States and the tobacco defendants could not negotiate any outcome that would have preempted the enforcement of § 1396p(b) and prejudiced the federal government's right to its share of Medicaid recoveries. The State must pursue estate recoveries, *see* § 1396p(b), and MSA funds are not considered recoveries for Medicaid purposes, *see* § 1396b(d)(3)(B)(ii).

Under the New Hampshire Supreme Court's approach, Medicaid recipients who suffer from a tobacco-related illness are entitled to release of their Medicaid

lien, a view Congress expressly rejected. *See id.* The court's decision judicially adds an additional exception Congress did not see fit to include. The court's decision inequitably places the State in the untenable position of not being permitted to comply with § 1396p(b) to collect the federal government's share of estate recoveries. *See, e.g., West Virginia v. U.S. Dept. of Health & Hum. Svcs.*, 289 F.3d 281, 297 (4th Cir. 2002) (states may be penalized for failure to enforce Medicaid liens and estate recoveries). The court's equitable justification for releasing the Medicaid lien creates confusion by presenting a novel approach to deciding a Medicaid recipient's right to MSA funds. This approach does not comport with the State's obligations to recover federal monies, especially since Congress has categorically exempted MSA funds from Medicaid.

III. The Question Presented is Recurring and Important.

These important federal questions involving the relationship between the Medicaid program and the historic MSA have nationwide significance. More specifically, the question is whether Medicaid recipients who smoked and who obtained government-funded medical care under the Medicaid system can avoid an otherwise valid lien on their estate, merely by claiming that the State has already been compensated through the MSA. These issues raise important questions of federal law since estate recoveries form an integral part of the Medicaid system, whereby the federal government, through the States, seeks to recoup a portion of its costs for providing medical care to the Medicaid recipient.

There were 40,844,000 Medicaid recipients nationwide in 1999, *see* U.S. Cens. Bur., Stat. Abs. of the U.S. (2002), at 100 (Table No. 132), and thousands of estates subject to recoveries. The Centers for Medicaid and Medicare Services report that in federal fiscal year 2002, approximately $350 million was recovered by the 45 of 55 jurisdictions that reported estate recoveries. Of the overall population, approximately 23.3% of all persons were cigarette smokers as of 2000. *See id.* at 124 (Table No. 185). States and the federal government rely upon the validity of liens and the funds secured by them to keep the Medicaid system financially sound and stable. Allowing estates of Medicaid recipients who suffered from smoking-related illnesses to avoid their obligations to repay the Medicaid system will undermine the integrity of the system, harm taxpayers who will have to contribute additional funds, and constitute a windfall for Medicaid recipients' heirs.

These federal Medicaid issues are likely to continue to arise as Medicaid recipients bring individual challenges seeking releases from Medicaid liens. Medicaid recipients tend to be of a demographic group comprised of present or former smokers, or those who were around other smokers, and are of an age when adverse effects express themselves as medical ailments. State governments face the potential of substantial fiscal harm as a result of the Medicaid liens that could be released, thereby threatening the States' budgetary determinations regarding MSA funds. As more cases make their way through the judicial system, the conflict created by the New Hampshire Supreme Court is likely to continue to lead to more recurring inconsistent decisions among the judiciary.

To date, this Court has not yet taken up the issue, presumably because the issue has been correctly decided

by all of the Courts of Appeal. Congress' intention in adopting § 1396b(d)(3)(B) and a State's obligation to pursue estate recoveries under § 1396p(b), are presented in a particularly "clean" and uncomplicated context. There are no factual issues in dispute. The Respondent's only claim, premised on equitable principles, is that equity and justice require release of the State's lien due to its receipt of MSA funds. Under the New Hampshire Supreme Court's decision, there are no jurisdictional questions or other procedural irregularities which would make this case an inappropriate vehicle for appellate review. The questions posed raise important issues of public policy which have not yet been presented for Supreme Court review, and which are now presented in a procedural setting inviting appellate review. For these reasons, the Court should grant the petition.

CONCLUSION

For all of the foregoing reasons, this case warrants the exercise of this Court's *certiorari* jurisdiction. The petition for writ of *certiorari* should therefore be granted by this Honorable Court.

Respectfully submitted,

PETER W. HEED
Attorney General

*CRAIG S. DONAIS
Assistant Attorney General
NEW HAMPSHIRE DEPARTMENT
OF JUSTICE
33 Capitol Street
Concord, NH 03301
603-271-3675

Attorneys for Petitioner
**Counsel of Record*

April 22, 2003

NOTICE: This opinion is subject to motions for rehearing under Rule 22 as well as formal revision before publication in the New Hampshire Reports. Readers are requested to notify the Reporters, Supreme Court of New Hampshire, Supreme Court Building, Concord, New Hampshire 03301, of any editorial errors in order that corrections may be made before the opinion goes to press. Opinions are available on the Internet by 9:00 a.m. on the morning of their release. The direct address of the court's home page is: http://www.courts.state.nh.us/supreme

THE SUPREME COURT OF NEW HAMPSHIRE

Rockingham County Probate Court
No. 2001-189

IN RE ESTATE OF GERALDINE A. RADUAZO

Argued: June 12, 2002
Opinion Issued: December 18, 2002

Philip T. McLaughlin, attorney general (*Craig S. Donais*, assistant attorney general, on the brief and orally), for the State.

Flynn & McGee, P.A., of Portsmouth (*John P. McGee, Jr.* on the brief and orally), for the Estate of Geraldine A. Raduazo.

BROCK, C.J. The Estate of Geraldine Raduazo (Estate) appeals from an order of the Rockingham County Probate Court (*O'Neill*, J.) granting the State's motion for summary judgment and dismissing the Estate's petition for release of monies from the Medicaid lien. On appeal, the Estate argues that the State released its Medicaid lien against the Estate when it settled litigation against

certain tobacco manufacturers in 1998. We reverse and remand.

As a preliminary matter, we note that the State styled the motion at issue as a motion to dismiss, or in the alternative, a motion for summary judgment. Because the trial court treated the motion as one for summary judgment, we will do the same. In reviewing a trial court's grant of summary judgment, we consider the affidavits and other evidence, and all inferences properly drawn from them, in the light most favorable to the non-moving party. *See Del Norte, Inc. v. Provencher,* 142 N.H. 535, 537 (1997). "If our review of that evidence discloses no genuine issue of material fact, and if the moving party is entitled to judgment as a matter of law, we will affirm the grant of summary judgment." *Id.* (quotation and brackets omitted). Where no material issue of fact is in dispute, we will determine only whether the prevailing party was entitled to judgment as a matter of law. *Id.* We review the trial court's application of the law to the facts *de novo*. *Id.*

The record supports the following facts. Geraldine A. Raduazo died in December 1997. According to an affidavit filed in the probate court, Raduazo had been a lifelong smoker, and had developed severe health problems related to her smoking. Prior to her death, she received medical assistance through the State's Medicaid program. At the time of her death, records of the New Hampshire Department of Health and Human Services indicated that Medicaid had paid $169,765.16 toward her medical expenses. The State therefore filed a statutory lien in that amount on Raduazo's estate. *See* RSA 167:14 (2002).

The only asset in Raduazo's estate was her home. The sale of her home resulted in approximately $60,000 being

available for distribution to the State in satisfaction of its Medicaid lien.

Before any monies were distributed to the State, it, along with forty-five other States and six territories, settled a lawsuit against a number of major tobacco companies in a Master Settlement Agreement (MSA). Under the MSA, the State will receive a stream of payments from the tobacco defendants valued at approximately $1.304 billion over twenty-five years.

The Estate petitioned the probate court for a declaration that the MSA released the State's lien on estate funds. The petition alleged that: (1) Raduazo assigned her rights of action against third parties when she received Medicaid, *see* RSA 167:14-a (2002); (2) the State took advantage of the assignment and made claims against major tobacco companies for smoking-related illnesses that led to Medicaid expenditures; and, therefore, (3) to the extent that the Medicaid expenditures made to Raduazo related to her smoking-related illnesses, and to the extent that the State has recovered from various tobacco companies for such expenditures, "justice, equity and general principles of subrogation" require that the State's lien against the Estate be deemed satisfied.

The State moved for summary judgment, arguing that the Estate's asserted right to recover the value of the State's statutory lien is not supported by applicable law and is barred by sovereign immunity. In granting the motion for summary judgment, the court stated, in pertinent part:

> The tobacco lawsuit is unrelated to Ms. Raduazo's individual claim against any tortfeasor that may have contributed to her death. The

> prayer for avoidance of the state's lien is essentially a claim for monetary damages against the State and is barred by the doctrine of sovereign immunity. *Newell v. New Hampshire Division of Welfare*, 131 N.H. 88 (1988). Furthermore, there were several causes of action cited in the tobacco suit some of which are unrelated to the medicaid payments made by the State and the settlement is not allocated to specific causes of action and it is unascertainable what part, if any, is allocable to the medicaid payments made by the state. More importantly, the State in the tobacco suit sought damages for unreimburseable payments made by it through the medicaid program to or for persons suffering from tobacco related illnesses which in the Geraldine A. Raduazo estate would be approximately $112,000.00 that the State cannot collect if the remaining assets in the estate are paid to the State pursuant to its lien.

The Estate appealed to this court.

I. Background

To facilitate an understanding of the issues involved in this appeal, we outline briefly the relevant Medicaid law, and the litigation and 1998 settlement between the State and the tobacco companies.

A. Assignment of Rights Under Medicaid

Medicaid is a joint federal-state program that provides medical services to certain persons in need. 42 U.S.C.A. §§ 1396 *et seq.* (1992 & Supp. 2002); *Wilder v. Virginia Hosp. Assn.*, 496 U.S. 498, 502 (1990). Through Medicaid, the federal and state governments share the cost of reimbursing health care providers for the cost of treating

individuals who are unable to pay for necessary medical care. The State of New Hampshire is obligated to administer its program pursuant to a plan approved by the Health Care Financing Administration that complies with the requirements set forth in the Medicaid Act and its implementing federal regulations. *See* 42 U.S.C.A. § 1396a (Supp. 2002); 42 C.F.R. §§ 430 *et seq.* (2001); *Wilder*, 496 U.S. at 502.

Some people require medical care as a consequence of an accident or illness for which a third party is liable. Federal law mandates that States require Medicaid recipients to assign any rights they possess against such third parties to the State, and requires States to make reasonable efforts to collect on all third-party claims that are assigned. *See* 42 U.S.C.A. §§ 1396a(a)(25), 1396k(a)(1)(A) (1992). RSA 167:14-a complies with this mandate. At issue in this case is whether New Hampshire's lawsuit against certain tobacco manufacturers was based, at least in part, upon an assignment of rights pursuant to RSA 167:14-a.

B. The Tobacco Litigation

New Hampshire filed suit against a number of major tobacco companies in 1997. The State alleged that the companies had committed a number of deceitful practices in violation of different State laws, and based its claim upon the following theories: fraudulent misrepresentation; fraudulent concealment; breach of warranty; public nuisance; negligent performance of voluntarily undertaken duty; *Restatement (Second) of Torts* § 389; restitution based upon unjust enrichment; violation of RSA chapter 356; violation of RSA chapter 358-A (Consumer Protection Act); and civil conspiracy (aiding and abetting). The State

sought both damages and injunctive relief. The request for injunctive relief included a request that the companies disclose all research pertaining to the health effects of tobacco use, take affirmative steps to prevent the distribution of tobacco products to children, and disclose the nicotine content of tobacco products. The State also sought damages, including restitution, under RSA chapters 358-A and 356, enhanced compensatory damages, disgorgement of the pecuniary gains from the sale of tobacco products, and payment of the State's costs of providing medical care related to tobacco use to non-Medicaid indigent persons. Furthermore, although the petition did not set forth a separate cause of action under Medicaid law, it requested (among other relief) that the court "award[ ] monetary relief . . . including but not limited to . . . the State's costs under the Medicaid program of providing medical care related to tobacco use."

In late 1998, New Hampshire settled its lawsuit against the major tobacco companies in the MSA. In exchange for a stream of payments and a number of other concessions by the tobacco defendants, the State released the participating tobacco companies from "all Released Claims that the Releasing Parties directly, indirectly, derivatively or in any other capacity ever had, now have, or hereafter can, shall or may have. . . . " MSA ¶ XII(a)(1), (3). "Released Claims" are those

> (1) for past conduct, acts or omissions (including any damages incurred in the future arising from such past conduct, acts or omissions), those Claims directly or indirectly based on, arising out of or in any way related, in whole or in part, to (A) the use, sale, distribution, manufacture, development, advertising, marketing or health effects of, (B) the exposure to, or (C) research,

> statements, or warnings regarding, Tobacco Products. . . .
>
> (2) for future conduct, acts or omissions, only those monetary Claims directly or indirectly based on, arising out of or in any way related to, in whole or in part, the use of or exposure to Tobacco Products manufactured in the ordinary course of business, including without limitation any future Claims for reimbursement of health care costs allegedly associated with the use of or exposure to Tobacco Products.

MSA ¶ II (nn). "Releasing Parties"

> means each Settling State and any of its past, present and future agents, officials acting in their official capacities, legal representatives, agencies, departments, commissions and divisions; and also means, to the full extent of the power of the signatories hereto to release past, present and future claims, the following: (1) any Settling State's subdivisions (political or otherwise, including, but not limited to, municipalities, counties, parishes, villages, unincorporated districts and hospital districts), public entities, public instrumentalities and public educational institutions; and (2) persons or entities acting in a parens patriae, sovereign, quasi-sovereign, private attorney general, qui tam, taxpayer, or any other capacity, whether or not any of them participate in this settlement, (A) to the extent that any such person or entity is seeking relief on behalf of or generally applicable to the general public in such Settling State or the people of the State, as opposed solely to private or individual relief for separate and distinct injuries, or (B) to the extent that any such entity (as opposed to an

> individual) is seeking recovery of health-care expenses (other than premium or capitation payments for the benefit of present or retired state employees) paid or reimbursed, directly or indirectly, by a settling State.

MSA ¶ II (pp).

II. Discussion

Citing the petition filed in the underlying tobacco litigation, the MSA, and State and federal Medicaid law, the Estate argues that it should be released from the Medicaid lien because the State recovered money from the tobacco defendants through an assignment of rights from the decedent. The State argues: (1) that the Estate's claim for an offset is barred by the doctrine of sovereign immunity; and (2) the State's claims against the tobacco companies were not based upon any assigned causes of action.

A. Sovereign Immunity

We address first the sovereign immunity issue. Under the doctrine of sovereign immunity, the State cannot be sued in its own courts without its consent or permission. *Tilton v. Dougherty*, 126 N.H. 294, 297 (1985). We conclude that the doctrine does not apply in this case because the Estate is not suing the State for damages. Rather, the Estate's claim arose in the context of a probate court proceeding when, pending the executrix's filing of a first and final account, the proceeds of the Estate were held in escrow. The Estate's petition merely seeks a ruling that the State's Medicaid lien has been satisfied, such that the State is no longer entitled to the proceeds from the Estate. At issue here is not whether the Estate can encroach on

the public treasury by reaching into the State's pocket, but, rather, whether the State should be permitted to reach into the Estate's pocket.

The cases the State relies upon to support its sovereign immunity argument are inapposite because they involved cases in which plaintiffs sought to require the States to distribute to the plaintiffs portions of tobacco settlement proceeds that *exceeded* the amount the State had paid for their tobacco-related injuries. *See, e.g., Strawser v. Lawton*, 126 F. Supp. 2d 994, 998-1001 (S.D. W. Va. 2001), *aff'd*, 290 F.3d 720 (4th Cir. 2002); *Barton v. Summers*, 111 F. Supp. 2d 989, 990 (M.D. Tenn. 2000), *aff'd*, 293 F.3d 944 (6th Cir. 2002). The Estate is not asserting a claim to any portion of the tobacco settlement which is in excess of the amounts necessary to pay back the State for its medical expenditures. Unlike the plaintiffs in *Strawser* and *Barton*, the Estate is not seeking to require the State to pay it a portion of the tobacco settlement funds. Rather, the Estate's position is that the State should be barred from collecting funds from the Estate to which the State claims it is entitled.

Furthermore, applying the doctrine in this case would not serve the doctrine's policy goals. When the legislature enacted RSA 99-D:1 in 1978, it codified the common law doctrine of sovereign immunity as the law of the State. *Tilton*, 126 N.H. at 298. Courts have explained the doctrine as a rule of social policy that serves two general public policy considerations: "the protection of the public against profligate encroachment on the public treasury, and the need for the orderly administration of government, which, in the absence of immunity, would be disrupted if the state could be sued at the instance of every citizen." *Berek v. Metropolitan Dade Cty.*, 396 So. 2d 756,

758 (Fla. Dist. Ct. App. 1981) (citations omitted); *see also City of Virginia Beach v. Carmichael Development*, 527 S.E.2d 778, 781-82 (Va. 2000); *Pamela B. v. Ment*, 709 A.2d 1089, 1106 (Conn. 1998); *Glassman v. Glassman*, 131 N.E.2d 721, 723 (N.Y. 1956); *Central Collection v. DLD*, 685 A.2d 873, 875 (Md. Ct. Spec. App. 1996); *cf. Opinion of the Justices*, 126 N.H. 554, 559-60 (1985) (identifying four considerations supporting continuation of the doctrine of sovereign immunity).

As we have noted, the Estate does not seek money from the State Treasury, so there is no need to bar the action in this case "to protect the public against profligate encroachment on the public treasury." Furthermore, there is no threat that the orderly administration of government will be disrupted by individuals seeking release from a Medicaid lien. In such cases, individuals will not be seeking an indeterminate amount of money from the State Treasury in the form of damages, but, rather, will essentially seek to bar the State from collecting money that the State has already collected from the tobacco defendants.

B. Assignment

We turn now to the Estate's argument that the probate court erred in ruling that the monetary settlement made pursuant to the MSA did not satisfy the State's lien against the Estate. The State argues that the tobacco litigation involved a direct action relating to damages sustained by the State as a result of actions by the tobacco companies, not an assigned cause of action. Therefore, none of the proceeds of the settlement are allocable to expenditures made on Raduazo's behalf, and none may be credited to the lien on her estate. Resolution of this issue

turns upon an interpretation of the nature and scope of both the assignment of rights made to the State pursuant to statute, and the release of claims made pursuant to the MSA.

RSA 167:14-a provides, in pertinent part:

> I. Any person who is a recipient of financial assistance, medical assistance, old age assistance or aid to the permanently and totally disabled shall, by his acceptance of such assistance, be deemed to have assigned any claim or right of action against any person or party to the commissioner of health and human services, to the extent that such assistance is furnished.
>
> II. Whenever a recipient of financial assistance, medical assistance, old age assistance or aid to the permanently and totally disabled shall have a legally cognizable claim against any person or party for expenses or support and the department of health and human services has already furnished assistance to such recipient, the amount of assistance furnished may be recovered in an action brought in the name of the state from such person or party against whom the recipient has a legally cognizable claim of expenses or support.
>
> III. The state medical assistance program is the payer of last resort and shall provide medical coverage only when there are no other available resources. Whenever a recipient of medical assistance shall receive a settlement or an award from a liable third person or party, such recipient shall repay the amount of medical assistance furnished by

> the state to the extent that the amount of the recovery makes repayment possible.

The effect of paragraph I is to provide, by operation of law, that when a Medicaid recipient receives money from the State, the recipient assigns his or her claims against potential third parties to the State, to the extent of the Medicaid payments received. Although paragraph III suggests that the recipient may not be divested of his or her right immediately upon receipt of benefits, common sense dictates that once the State, as assignee, exercises the right and obtains a settlement or judgment based upon it, the assignor is divested of the right, and the assignor's claim is extinguished. Thus, a key question in this case is whether the State, in fact, exercised Raduazo's rights when it sued, and obtained a settlement from, the tobacco companies.

We conclude that the State's litigation against the tobacco companies was based, at least in part, upon Raduazo's statutorily assigned right to recover medical expenses from a liable third party. The tobacco litigation petition stated, in part:

> 3. Citizens of the state of New Hampshire have suffered because of, and the State has incurred expenses related to, the use of tobacco in New Hampshire. New Hampshire citizens have become ill and died from tobacco-related diseases. The State has expended and continues to expend millions of dollars annually in Medicaid payments and other State-funded programs to provide funds for the diagnosis and treatment of tobacco-related illnesses.

The petition also requested that the court "award[ ] monetary relief . . . including but not limited to . . . the State's

costs under the Medicaid program of providing medical care related to tobacco use." Furthermore, in the MSA, the State released any and all claims it had against the tobacco companies whether such claims were held directly or derivatively. As one court noted, "[t]he settlement agreement releases the tobacco defendants from liability for state-paid medical expenses, i.e., expenses paid by the medical- and general-assistance programs." *Brown v. State*, 617 N.W.2d 421, 425 (Minn. Ct. App. 2000), *cert. denied*, 532 U.S. 995 (2001).

Under the settlement agreement, the State stepped into the shoes of the Medicaid recipients and obtained a settlement based upon their rights. In doing so, the State divested the Medicaid recipients suffering from tobacco-related illnesses of their right to pursue health care costs that were covered by the State's medical assistance programs and to recover damages in the amount of the medical expenses paid on their behalf. That the MSA may not bar Medicaid recipients from bringing claims against the tobacco companies for other damages, such as pain and suffering, lost wages or earning capacity, *Brown*, 617 N.W.2d at 427, does not alter our conclusion. To bar the Estate from demonstrating that the payments made pursuant to the MSA were made, in part, to reimburse the State for monies paid through the Medicaid program on Raduazo's behalf would effectively permit the State to collect the amount of money to which it is entitled twice, and unjustly enrich the State at the expense of the Estate.

We recognize, as the State points out, that neither the decedent nor her Estate was a named party in the tobacco litigation. The statute, however, authorizes the State to bring a subrogation action "in the name of the state from such person or party against whom the recipient has a

legally cognizable claim of expenses or support." RSA 167:14-a, II. We also recognize, as the State points out, that the State's tobacco litigation "went far beyond any personal cause of action attributable to the decedent or any other Medicaid recipient," but conclude that the litigation encompassed a claim for payments made to Medicaid recipients arising from recipients' assigned causes of action.

The probate court concluded, and the State argues on appeal, that the State sought damages only for those "unreimburseable payments" made by it through the Medicaid program, and that because the payments made to Raduazo are reimburseable (at least in part) through the estate lien, the payments were not recovered in the tobacco settlement. Neither the probate court nor the State has pointed to any language in the State's petition in the tobacco litigation or the MSA to support such an interpretation. Nor have we been able to find any.

We also disagree with the State that our ruling that the tobacco litigation was predicated, in part, upon assigned claims will "stand in stark contrast to the courts nationwide that have denied Medicaid recipients any direct right to the MSA proceeds." The plaintiffs in each of the cases cited by the State were Medicaid recipients who argued that they had a right to that portion of the settlement that exceeded the States' actual medical expenses pursuant to a federal statutory framework governing a State's distribution of any recovery on a third-party claim assigned by a Medicaid recipient. *See, e.g., Strawser v. Atkins*, 290 F.3d 720, 727-28 (4th Cir. 2002); *Greenless v. Almond*, 277 F.3d 601, 605 (1st Cir. 2002); *McClendon v. Georgia Dept. of Community Health*, 261 F.3d 1252, 1255 (11th Cir. 2001); *Harris v. Owens*, 264 F.3d 1282, 1285-87

(10th Cir. 2001), *cert. denied*, 122 S. Ct. 2294 (2002); *Tyler v. Douglas*, 280 F.3d 116, 117-18 (2d Cir. 2001), *cert. denied*, 122 S. Ct. 2361 (2002); *Watson v. Texas*, 261 F.3d 436, 439 (5th Cir. 2001); *Floyd v. Thompson*, 227 F.3d 1029, 1032, 1035 (7th Cir. 2000); *Skillings v. Illinois*, 121 F. Supp. 2d 1235, 1236 (C.D. Ill. 2000); *Brown*, 617 N.W.2d at 423; *State of California v. Superior Ct.*, 99 Cal. Rptr. 2d 735, 738 (Ct. App. 2000).

The federal statute at issue in the above-cited cases governs a State's distribution of a recovery on a third-party claim assigned by a Medicaid recipient. Pursuant to the statute, payments go first to a State to satisfy its relevant Medicaid expenses, then to the federal government to satisfy its relevant Medicaid expenses, and then to the patient who assigned the claim. *See* 42 U.S.C.A. § 1396k(b) (1992); *see also* 42 C.F.R. § 433.154 (2001). According to the class-action plaintiffs in the above-cited cases, the tobacco settlement constituted a Medicaid recovery subject to this scheme. Therefore, they asserted that state officials were required by the statute to distribute to them the "excess" funds recovered under the settlement.

All of the courts dismissed the claims, but provided different rationales for doing so. Some courts held that the MSA only settled claims for money the State actually expended to provide medical services to recipients of public aid, and that because a recipient would not be entitled to money expended on his or her behalf, the recipient has no claim to any portion of the settlement proceeds. *See McClendon*, 261 F.3d at 1261; *Floyd*, 227 F.3d at 1036; *Skillings*, 121 F. Supp. 2d at 1237-38; *Brown*, 617 N.W.2d at 426-27. Those courts generally reasoned that the MSA did not bar individual Medicaid recipients

from pursuing the tobacco defendants to recover for their own alleged injuries. Because the only money the State recovered was what it paid to cover the medical expenses of the Medicaid recipients, and because the recipient had no claim to this money, there was "nothing in the [settlement agreement] to which the plaintiffs may assert a claim." *McClendon*, 261 F.3d at 1261 (quotation omitted). The reasoning of these cases is not inconsistent with our holding that because the MSA settled claims for money the State *actually expended* on Medicaid, the State is barred from collecting that money a second time from the recipient's estate.

Other courts have held that a 1999 amendment to the federal Medicaid statute rendered the federal statutory framework governing a State's distribution of any recovery on a third-party claim assigned by a Medicaid recipient inapplicable to the tobacco settlement. *See Strawser*, 290 F.3d at 732; *Greenless*, 277 F.3d at 608; *Harris*, 264 F.3d at 1294-95; *Tyler*, 280 F.3d at 121-24. Regardless of the reasoning set forth in these cases, they do not apply. In this case, the Estate is not seeking a portion of the tobacco settlement in excess of the amount the State paid to Medicaid recipients for tobacco-related illnesses pursuant to the federal statutory scheme. Only two courts, whose reasoning on this issue we find unpersuasive, rejected the plaintiffs' claims on the grounds that no part of the tobacco litigation was premised upon an assignment of rights. *See Watson*, 261 F.3d at 444; *State of California*, 99 Cal. Rptr. 2d at 740-42.

The State argues that even if Raduazo suffered injuries caused by smoking tobacco products and that the State pursued assigned causes of action, the probate court properly dismissed the Estate's petition because there is

no evidence in the record to date regarding the extent to which the State's Medicaid payments to Raduazo were associated with tobacco-related illness, whether her illness or disease was caused by smoking, or the nexus connecting her tobacco use with the tobacco defendants who are parties to the MSA. Because the probate court did not address this issue, we decline to consider it.

For the foregoing reasons, we reverse the probate court's ruling dismissing the Estate's petition and remand for proceedings not inconsistent with this opinion.

Reversed and remanded.

NADEAU and DALIANIS, JJ., concurred; DUGGAN, J., dissented.

DUGGAN, J., dissenting. Because I conclude that the probate court was correct in ruling that the monetary settlement made pursuant to the MSA did not satisfy the State's lien against the Estate, I would affirm that court's decision and not reach the sovereign immunity issue.

The State argues that the tobacco litigation involved a direct action relating to damages sustained by the State as a result of actions by the tobacco companies, not a subrogation action brought to enforce those rights Raduazo assigned to the State pursuant to RSA 167:14-a. Therefore, the State argues, none of the proceeds of the settlement are allocable to expenditures made on Raduazo's behalf, and none may be credited to the lien on her estate. Resolution of this issue turns on an interpretation of the nature of the State's action against the tobacco companies.

The issue is whether the State brought suit against the tobacco companies in a subrogation action, or whether the State sued independently for the financial harms that

it has suffered as a consequence of the tortfeasors' actions, because if the State brought the action in subrogation, then the State stepped into Raduazo's shoes to enforce a right she would have enjoyed had she decided to bring suit. *See McCullough v. Company*, 90 N.H. 409, 411 (1939) (superseded by statute on other grounds); *see also* 73 Am. Jur. 2d § 1 *Subrogation* (2001). If this were the case, then the State necessarily exercised Raduazo's rights when it sued and obtained a settlement from the tobacco companies. *McCullough*, 90 N.H. at 411. Under these circumstances, the equities would arguably weigh in favor of precluding the State from enforcing its lien. In such a situation, the State would have divested Raduazo of her claim against the tobacco companies, and would presumptively have recovered the cost of the benefits Raduazo received. Therefore, allowing the State to enforce its lien would arguably permit the State to recover twice the amount of benefits it actually paid to Raduazo.

If, however, the State's action against the tobacco companies was a direct action, then the equities would arguably weigh in favor of allowing the State to enforce its lien. In such a situation, the State would not have divested Raduazo of her claim against the tobacco companies, and would not necessarily have recovered the cost of the benefits Raduazo received.

Whether the MSA settled any subrogated claims the State may have had against the tobacco companies requires consideration of the nature of the claims the State made against the tobacco companies and the scope of the release of claims made pursuant to the MSA. A review of the underlying litigation leads to the conclusion that the State's suit against the tobacco companies was not filed and settled on behalf of smokers like Raduazo, but instead

was a direct action filed for the benefit of all citizens whose tax dollars were and will be spent caring for harms that the tobacco industry allegedly caused.

The State filed suit against the tobacco companies in its own name. Neither Raduazo nor her estate was a named party to the litigation. Indeed, the litigation was pursued and settled without any reference to, participation in, or involvement by, any individual Medicaid recipients. The State's petition does not include any reference to any particular assigned causes of action or subrogated claims asserted by the State on behalf of any Medicaid recipients. All of this suggests that the State did not sue the tobacco companies to enforce any rights that individual Medicaid recipients had assigned to it.

This view of the nature of the State's litigation against the tobacco companies is consistent with the view expressed by other courts and commentators that the States sued the tobacco companies directly, and not on behalf of injured smokers. *See Watson v. Texas*, 261 F.3d 436, 444-45 (5th Cir. 2001); *State of California v. Superior Court*, 99 Cal. Rptr. 2d 735, 742 (Ct. App. 2000); *State v. Philip Morris, Inc.*, 686 N.Y.S.2d 564, 567 (Sup. Ct. 1998), *aff'd*, 693 N.Y.S.2d 36 (App. Div. 1999); Jacobson & Warner, *Litigation and Public Health Policy Making: The Case of Tobacco Control*, 24 J. Health Pol. Pol'y & Law 769, 777 (Aug. 1999); Kelder & Daynard, *The Role of Litigation in the Effective Control of the Sale and Use of Tobacco*, 8 Stan. L. & Pol'y Rev. 63, 82 (Winter 1997). In deciding to proceed directly, the States hoped to avoid both the need to prove individual causation and the defenses applicable to individual plaintiffs, such as assumption of the risk and comparative fault. According to one commentator:

> In essence, the [tobacco] litigation was designed to circumvent the freedom-of-choice and individual-rights strategies that tobacco attorneys had used to win previous litigation. In the [tobacco] litigation, claims were aggregated at the State level to avoid the blameworthiness problems faced by individual litigants and the need to show individual causation. Consistent with the underlying theory of the case, the state attorneys general attempted to prove their case based on epidemiological studies of the population-based harms caused by tobacco, not by harms to specific individuals. Since the state has no choice but to absorb the Medicaid costs of tobacco-related diseases, and it is the taxpayers, not smokers, who are injured financially, the states argued that the traditional industry defenses raised in individual litigation are irrelevant.

Jacobson & Warner, *supra* at 777 (citation omitted).

The terms of the MSA further support the conclusion that the tobacco litigation was a direct action. While the State released all claims it may have brought against the tobacco companies, the MSA specifically preserves the rights of smokers or their estates to assert their own claims against the tobacco companies. For example, the MSA limits the "releasing parties" to the Settling States and their various subdivisions and constituent institutions. *See* MSA ¶ II(pp); *see also McClendon v. Georgia Dept. of Community Health*, 261 F.3d 1252, 1261 (11th Cir. 2001); *Floyd v. Thompson*, 227 F.3d 1029, 1037 (7th Cir. 2000). "Individual persons under M.S.A. ¶ II(pp)(2)(A) release claims only insofar as they are acting for the state and suing on general injuries, not insofar as they are seeking solely . . . private or individual relief for separate and distinct injuries." *Floyd*, 227 F.3d at 1037 (quotation

and ellipsis omitted). Thus, the State did not release claims against any tobacco defendant held by individuals, and did not extinguish the claims of individual persons who were not part of the settlement process to recover health care expenses paid by the individual. *See id.*

It is true that the State's petition stated that "[t]he State has expended and continues to expend millions of dollars annually in Medicaid payments and other State-funded programs to provide funds for the diagnosis and treatment of tobacco-related illnesses," and requested monetary relief including, "the State's costs under the Medicaid program of providing medical care related to tobacco use." The Medicaid expenditures cited refer, however, to the State's expenditures that arose because of the inability of Medicaid recipients to pay for all expenses associated with their care. These costs do not include costs that recipients, through their estates, are ultimately able to pay, but only, as the probate court concluded, those *unreimburseable* payments made to Medicaid recipients suffering from tobacco-related illnesses. Under this interpretation of the MSA, to the extent that the State collects on its lien from her estate, Raduazo has "paid" for at least some of her own health care expenses, and her estate is entitled to pursue the tobacco companies to recover, among any other claims her estate may have, these expenses.

The majority holds that the State's litigation against the tobacco companies was based in part upon Raduazo's statutorily assigned right to recover medical expenses from a liable third party, and that the Estate should therefore be afforded the opportunity to prove that some portion of the State's lien should be discharged. However, it is unclear what the Estate must prove in order to have the lien discharged. Presumably, at the very least, the

Estate must prove that Raduazo's illness was caused by smoking and that there is some connection between her tobacco use and the defendants who are parties to the MSA. Whether the Estate must prove, as the State suggests, that the tobacco companies who are parties to the MSA are liable for her injuries is an issue about which the majority makes no comment. If, in order to prove that some or all of the lien should be discharged, the Estate is required to prove that the State's Medicaid payments on her behalf were associated with tobacco-related illnesses, that the illnesses were caused by smoking, and that the tobacco defendants who are parties to the MSA are liable for her illnesses, then today's decision does nothing more than allow the Estate to prove the same case in an action against the State as it would in an action against the tobacco companies themselves. This seems an odd result, as it would put the State in a position of defending claims the tobacco defendants would be better equipped to defend.

A more difficult question, not addressed by today's decision, is how the probate court is to determine what portion of the lien should be discharged. As the probate court pointed out, and as is clear from the petition in the underlying tobacco litigation, the State sought damages

> including but not limited to (1) the State's costs under the Medicaid program of providing medical care related to tobacco use; (2) the State's cost of providing to non-medicaid indigent persons medical care related to tobacco use; (3) disgorgement of the pecuniary gain realized by the defendants from wrongful conduct; (4) restitution, civil penalties and attorney's fees pursuant to RSA 358-A:6, IV for alleged consumer protection violations; (5) civil penalties and attorney's fees

> pursuant to RSA 356:4-a, b, and c for alleged antitrust violations and (6) enhanced damages based on the egregious nature of the tobacco defendants' conduct.

As the probate court pointed out, the MSA does not allocate payments to any specific theory of recovery or relief. Therefore, it is unclear what portion of the settlement payments can be specifically attributed to payments made by the State under Medicaid or other public assistance programs to or for persons with smoking-related diseases.

Even if it were possible to allocate the settlement to specific causes of action and to determine what part is allocable to the Medicaid payments made by the State, the probate court would still need to determine what portion of the settlement allocable to the Medicaid payments are allocable to Raduazo's assigned claim, as opposed to the claims assigned by other Medicaid recipients suffering from tobacco-related illnesses. This task will be further complicated by the fact that the State probably did not collect the full value of the assigned claims, given that payments were made pursuant to a settlement agreement.

Other courts have recognized that allowing Medicaid recipients to benefit from the MSA may create "administrative problems," *Floyd*, 227 F.3d at 1038. There are, of course, many Medicaid recipients who have in the past been required to reimburse the State through execution of a lien or otherwise. Whether those recipients will now be able to recover for the amount of the executed liens remains to be seen. In addition, the MSA covers future claims. Today's holding raises doubts about the State's ability to obtain and execute on future liens for future recipients of Medicaid.

Because the State sued the tobacco defendants in a direct action to recover for the unreimburseable financial harms it suffered, because the MSA specifically preserves the rights of smokers and their estates to assert their own claims against the tobacco companies, and because of the potential impact of today's holding, I would affirm the trial court's decision to grant the State's motion for summary judgment. Therefore, I respectfully dissent.

THE STATE OF NEW HAMPSHIRE

ROCKINGHAM COUNTY PROBATE COURT

IN RE: Estate of Geraldine A. Raduazo

DOCKET NUMBER 1998-0064

ORDER

A hearing was held on February 15, 2001 on the Motion to Dismiss or, in the Alternative, Motion for Summary Judgment filed by the State of New Hampshire Department of Health and Human Services (State) and objection thereto filed by the executrix of the estate of Geraldine A. Raduazo (estate). Present were Terry D. Ashe, executrix, John P. McGee, Jr., Esq. And Craig S. Donais, Esq. THE COURT MAKES THE FOLLOWING FINDINGS:

The State seeks dismissal or in the alternative summary judgment with respect to the estate's Petition for Release of Monies From Medicaid Lien. The estate objects. The Petition for Release of Monies from Medicaid Lien alleges that the State has claimed a Medicaid lien against the Estate of Geraldine A. Raduazo in the amount of $169,765.16. The only substantial asset of the estate was real estate which was sold and the proceeds after payment of the mortgage were placed in escrow by the executrix. Subsequently, the executrix learned that the State of New Hampshire had entered into a settlement agreement with various tobacco companies. The executrix now seeks release of the State's medicaid lien as the expenditures made by the State on behalf of Geraldine A. Raduazo were related to her smoke-related illnesses and the State has now recovered its expenditures from various tobacco companies.

The State asserts that it has a statutory lien under RSA 167:14-a, II for repayment for a portion of the moneys it has spent on health care services to Ms. Raduazo under the States's Medicaid program. The State alleges that the estate seeks release of the State's Medicaid lien relying solely on the fact that in 1998, the State entered into a settlement agreement and consent decree with various tobacco manufacturers, trade associations and research institutes under which the State receives an agreed-upon stream of payments on an annual basis. The State argues that the estate's claim is deficient in that it is based upon the inaccurate assertion that the State's action against the tobacco defendants was based in whole or in part on the statutory assignment of rights by New Hampshire Medicaid recipients to the State under RSA 167:14-a, I; and that payments by the tobacco defendants are based in whole or in part upon Medicaid payments made by the State to recipients who required care due to tobacco related sickness. The State alleges that the tobacco lawsuit and payments received under the agreement reached are unrelated to Ms. Raduazo or to any claim which she or her estate may bring against any tortfeasors that may have caused or contributed to her death. In fact the agreement preserves her or her estate's right to pursue such claims independently. The State asserts that the absence of any direct link between the agreement and the decedent constitutes an assertion by her estate that it is entitled to a share of the payments received by the State under the agreement and as such is barred by the doctrine of sovereign immunity. The State alleges that the characterization of the agreement as a derivative action on behalf of the decedent and other Medicaid recipients is incorrect and on that basis the estate's petition must be

dismissed or in the alternative summary judgment should be granted to the State.

The State sought recovery from the tobacco defendants under several causes of action including common law torts of fraudulent misrepresentation, fraudulent concealment, public nuisance, negligent performance of a voluntarily undertaken duty, breach of warranty, and statutory causes of action for damages and penalties under the Consumer Protection Act and the Combinations and Monopolies Act. In the tobacco lawsuit the State sought an amount to be determined at trial, including but not limited to (1) the State's costs under the Medicaid program of providing medical care related to tobacco use; (2) the State's cost of providing to non-medicaid indigent persons medical care related to tobacco use; (3) disgorgement of the pecuniary gain realized by the defendants from wrongful conduct; (4) restitution, civil penalties and attorney's fees pursuant to RSA 358-A:6, IV for alleged consumer protection violations; (5) civil penalties and attorney's fees pursuant to RSA 356:1-a, b and c for alleged antitrust violations and (6) enhanced damages based on the egregious nature of the tobacco defendants' conduct. In July of 1998, the State entered into a Master Settlement Agreement (MSA) with all the defendants. On December 14, 1998, the Merrimack County Superior Court entered a Consent Order approving the MSA. The MSA provides for a stream of payments from the tobacco defendants to the State of approximately $1.304 billion over twenty-five years. The MSA does not allocate payments to any specific theory of recovery or relief sought by the State and therefore no portion of the settlement payments can be specifically attributed to payments made by the State under Medicaid or other public assistance programs to or for

persons with smoking related diseases. No payments under the MSA are attributable to an assigned claim for damages pursuant to RSA 167:14-a, I by any Medicaid recipient or any class of such persons and the MSA preserves the right of the individuals to file suit against all tobacco manufacturers and other defendants in order to assert individual claims for damages based on their use of defendants' products. The State further alleges that the State's claim in the tobacco lawsuit was based upon the unreimbursed expenditures by the State under its Medicaid and other public assistance programs for medical care to individuals suffering from smoking-related illness. This would only relate to that part of the lien against Ms. Raduazo's estate which will not be reimbursed to the State. The present value of the estate is approximately $57,587.59 and the State's lien is for $169,765.16. Presumably, the State can only be reimbursed in the amount of the estate, $57,587.59, and the remaining unreimbursed expenditures of approximately $112,000.00 is the subject of the claim made by the State in the tobacco lawsuit.

The estate takes the position that the State of New Hampshire is "double dipping" in asserting its lien against this estate in that it collected millions of dollars from the tobacco lawsuit for smoking related illness suffered by its citizens and now seeks the estate funds. The estate asserts that by operation of both Federal and State law, Ms. Raduazo assigned any right she had to claim reimbursement of monies paid by the State of New Hampshire under its Medicaid program to the State of New Hampshire. The estate further asserts that under equitable provisions of subrogation as well as under the provisions of Federal law and specifically 42 USCS section 1396 (k)(b) the State of New Hampshire is required to recognize that its lien

against the Estate of Geraldine A. Raduazo has been satisfied by its settlement with the tobacco companies. The estate disputes the arguments made by the State and seeks to have the Motion to Dismiss or in the Alternative Motion for Summary Judgment denied.

In a Motion for Summary Judgment the standard of review is whether on the basis of the pleading, affidavits or other submitted materials, there are no material questions of fact and the moving party is entitled to judgment as a matter of law. *Roberts v. General Motors Corp.*, 138 N.H. 532 (1994). The State has asserted a lien against this estate pursuant to RSA 167:14-a, II. The challenge of the executrix to the lien is based upon the MSA. The tobacco lawsuit is unrelated to Ms. Raduazo's individual claim against any tortfeasor that may have contributed to her death. The prayer for avoidance of the state's lien is essentially a claim for monetary damages against the State and is barred by the doctrine of sovereign immunity. *Newell v. New Hampshire Division of Welfare*, 131 N.H. 88 (1988). Furthermore, there were several causes of action cited in the tobacco suit some of which are unrelated to the medicaid payments made by the State and the settlement is not allocated to specific causes of action and it is unascertainable what part, if any, is allocable to the medicaid payments made by the state. More importantly, the State in the tobacco suit sought damages for unreimburseable payments made by it through the medicaid program to or for persons suffering from tobacco related illnesses which in the Geraldine A. Raduazo estate would be the approximately $112,000.00 that the State cannot collect if the remaining assets in the estate are paid to the State pursuant to its lien. The court finds that based upon the pleadings, affidavits or other

submitted materials, there are no material questions of fact in this case and that the State is entitled to judgment as a matter of law. BASED UPON THESE FINDINGS, THE COURT MAKES THE FOLLOWING ORDER:

1. The State's Motion for Summary Judgment is GRANTED.

2. The estate's Petition for Release of Monies from Medicaid Lien is DENIED.

3. Prayers B and C of the State's Motion for Summary Judgment are GRANTED.

Dated: March 1, 2001

/s/ Christina M. O'Neill
Christina M. O'Neill,
Judge of Probate

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case No. 2001-189, *In re Estate of Geraldine A. Raduazo*, the court on January 22, 2003, made the following order:

Joint motion to vacate opinion and dismiss appeal is denied. Motion for leave to file as *amicus curiae* is denied. Motion to admit John Albrecht, Esquire, *pro hac vice*, is therefore moot.

State's motion for reconsideration is denied.

Brook, C.J., and Nadeau and Dalianis, JJ., concurred; Duggan, J., concurred in the rulings upon the first three motions addressed above, but would grant the State's motion for reconsideration.

Eileen Fox,
Clerk

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No. 02-1548

In The

Supreme Court of the United States

STATE OF NEW HAMPSHIRE DEPARTMENT OF HEALTH & HUMAN SERVICES,

Petitioner,

v.

ESTATE OF GERALDINE A. RADUAZO,

Respondent.

On Petition For A Writ Of Certiorari To The New Hampshire Supreme Court

BRIEF IN OPPOSITION

JOHN P. MCGEE, JR.
Counsel of Record
FLYNN & MCGEE, P.A.
222 Court Street
Portsmouth, NH 03801
(603) 436-5360

Attorney for Respondent

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COUNTER-STATEMENT OF THE CASE

Respondent, Geraldine A. Raduazo, died December 31, 1997 in Portsmouth, New Hampshire. Respondent was a lifelong smoker. In her later years, she needed extensive medical care. The State of New Hampshire, through its Medicaid Program, contributed $169,765.16 toward that care.

The only asset in Respondent's Estate at the time of her death was her homestead premises. The premises were sold in October of 1998. The State had filed a lien on account of Medicaid payments. Satisfaction of the Medicaid Lien was scheduled for early 1999 when Terry D. Ashe, Executrix, would file her Final Account.

In 1997, the State of New Hampshire had brought an equitable suit/legal action in the Merrimack County Superior Court alleging widespread wrongdoing by various national tobacco companies. On December 11, 1998, the Superior Court approved the State's execution of the Master Settlement Agreement (hereinafter "MSA") thereby settling the suit/action. The MSA did reserve to smokers the right to bring their own actions against the tobacco companies. However, it also released any rights of action held by the State against the tobacco companies. New Hampshire State Statute provides that those who receive certain assistance, including Medicaid, assign their claims against third parties to the State.

After learning of the MSA through news accounts, counsel for Respondent contacted the State Attorney General's Office. Counsel for Respondent suggested that the lien against Respondent had been satisfied with the State's release of her claim for medical expenses against

the tobacco companies by the State. The Attorney General's Office advised counsel for Respondent that a response would take approximately six months. When the matter was still unresolved in late 1999, the Respondent filed a Petition in the Rockingham County Probate Court requesting Declaratory Relief that the release given by the State through the MSA had, in fact, satisfied the outstanding Medicaid Lien.

The Rockingham County Probate Court dismissed such Petition upon the State's Motion For Summary Judgment. The Court determined that Respondent was making a claim for monetary damages barred by sovereign immunity and that further, the State, in bringing litigation against the tobacco companies, was acting on its own behalf and not on behalf of individual Medicaid recipients. The Court further noted that there would be an inability to allocate damages received by the State through the MSA.

Respondent appealed the decision of the Rockingham County Probate Court to the New Hampshire Supreme Court. The Court first held that sovereign immunity was not a bar to Respondent's Petition For Relief. The Court then noted that the State's Petition brought in the Merrimack County Superior Court was replete with references to damages incurred by Medicaid expenditures. The Court further noted that, under RSA 167:14-a, Respondent's claims for medical expenses had been assigned to the State and that it was authorized to bring subrogation actions in its own name. The Court then went on to determine that the State, through the MSA in fact, had released the tobacco companies from claims for medical expenses assigned to the State and that as such, the Respondent was entitled to claim satisfaction to the extent

that her medical expenses were smoking related. The Court remanded the matter to the Probate Court for further determinations consistent with the opinions expressed by the Court.

The State subsequently filed a Motion For Reconsideration which was denied January 22, 2003. Its Petition to this Honorable Court for "certiorari" followed.

REASONS FOR DENYING THE PETITION

The Petition in this case should be denied because the decision of the New Hampshire Supreme Court does not conflict with decisions of numerous United States Courts of Appeal nor does it involve an important question of Federal Law.

I

THE NEW HAMPSHIRE SUPREME COURT'S RULING DOES NOT CONFLICT WITH DECISIONS OF NUMEROUS FEDERAL COURTS OF APPEAL, INCLUDING THE FIRST CIRCUIT.

A number of class action suits were filed in various Federal District Courts following the MSA. Invariably, the suits were filed against various States or their officials by living Medicaid recipients who claimed that they were entitled to share in the monies received by the States on the basis of 42 U.S.C. § 1396k.

The litigants in the class action suits displayed the same creativity that the States had shown in bringing their own suits against the tobacco companies. The Petitions and Complaints used by the States against the

tobacco companies had, as their backbone, the massive damages suffered by the States for Medicaid expenditures. The litigants in the following class action suits against the States quite correctly pointed out that under 42 U.S.C. § 1396k, Medicaid recipients assigned their rights against third parties (including tobacco companies) and the States, after paying themselves and the Federal Government back, were to pay over monies collected to the third parties who were the original assignors.

The class actions brought by Medicaid recipients were universally unsuccessful in the Federal Courts. In the initial phase of such litigation, two main arguments appear. Some Federal Courts chose to dismiss the suits on the basis of the Eleventh Amendment. Other Courts, not wishing to invoke the constitutional issues raised by the Eleventh Amendment, relied upon the retained right of smokers to bring their own actions as specifically reserved in the MSA. A corollary to the latter argument was that Medicaid recipients had only assigned their rights to medical expenses actually paid by the States and not their rights to other aspects of their claims and thus, they had no right to share in the actual monies received.

In the case "at bar", the Eleventh Amendment is certainly not an issue. Further, the law of assignment as well as interpretation of the MSA relative to the law of assignment is appropriate to the jurisdiction of a State Court when such matters are brought before it.

More recently, the various States fighting the class actions brought by Medicaid recipients have argued that Title III of the 1999 Emergency Supplemental Appropriations Act impliedly repealed or modified 42 U.S.C. § 1396k to the extent that States receive money pursuant to the

MSA. Pertinent parts of that legislation have been codified at 42 U.S.C. § 1396b(d)(3)(B)(i) and (ii).

The gist of the argument presented by the State is that by subsection (i) of the Statute, Congress changed the basic law so that settlement funds received by the States from the tobacco companies were not "overpayments" subject to partial reimbursement to the Federal Government and that Subsection (ii) gave the States "carte blanche" to do with monies received from the tobacco companies as they might determine without restriction. Six Courts of Appeal have now, in fact, accepted this argument and denied living Medicaid recipients the right to share in the excess proceeds collected by the States: *Barton v. Summers*, 293 F.3d 944 (6th Cir. 2002); *Cardenas v. Anzai*, 311 F.3d 929 (9th Cir. 2002); *Greenless v. Almond*, 277 F.3d 601 (1st Cir. 2002); *Harris v. Owens*, 264 F.3d 1282 (10th Cir. 2001), cert. den., 122 S. Ct. 2294 (2002); *Strawser v. Atkins*, 290 F.3d 720 (4th Cir.), cert. den., 123 S. Ct. 618 (2002); *Tyler v. Douglas*, 280 F.3d 116 (2nd Cir. 2001), cert. den., 122 S. Ct. 2361 (2002).

Each of the above cited cases deals with living Medicaid recipients attempting to share in the recovery made by the State. Thus, in those cases, the litigants are literally attempting to put their hands in the State's pocket. This case is critically different. The Respondent is attempting to keep the hands of the State from reaching into her pocket.

The legislative rationale of 42 U.S.C. § 1396b(d)(3)(B)(ii), in allowing the States to keep the tobacco monies without obligation to pay any of it over to third parties, is very understandable especially given the situation where the MSA reserves to individuals the right to bring their own

actions against tobacco companies for their own damage and injury. In this case, however, if the Respondent is forced to pay back to the State Medicaid monies advanced by it, she has no right over against the tobacco companies since the State has already released those claims through the MSA. Living Medicaid recipients seeking money is not only far different from the case "at bar", but application of the Statute as suggested by Petitioner, would do violence to the concept of "due process" and impute to Congress a statute which takes away vested property rights without compensation or adequate protection of "due process."

Only one Circuit has dealt with the issue of an estate being given credit against a Medicaid lien as a result of the MSA. A panel of the Ninth Circuit in *Anderson v. Willden*, 314 F.3d 1004 (9th Cir. 2002) "per curiam" found that *Cardenas v. Anzai*, 311 F.3d 929 (9th Cir. 2002) held that 42 U.S.C. § 1396b(d)(3)(B)(ii) precludes any Plaintiff from establishing any claim for their own accounts arising from the tobacco settlement. Respondent would contend that that was an unwarranted expansive reading of *Cardenas* and, that further, it failed to take into account the aforementioned issues relative to "due process" and wrongful taking. Moreover, 42 U.S.C. § 1396b(d)(3)(B)(ii) says nothing about precluding Plaintiffs from establishing any claim. It does say that a State may use amounts recovered from the MSA for any expenditures determined appropriate by the States. Given this, the circumstances of *Anderson* are very different from the case "at bar".

The New Hampshire Supreme Court ruled that a State Statute and a corollary principle of law (i.e., release by a subrogee extinguishes a claim) eliminated the right of the Recovery Division of the New Hampshire Department of Health and Human Services to collect a second time

from the Estate, monies received from the tobacco companies for medical expenses paid out for any smoking related illness suffered. To the extent that this may even be considered an "expenditure" within the meaning of 42 U.S.C. § 1396b(d)(3)(B)(ii) (and Respondent contends it is not), it is an expenditure deemed appropriate by the determination of the Highest Court in the State acting according to the laws of that State. Thus, even if 42 U.S.C. § 1396b(d)(3)(B)(ii) has the meaning which the State wishes to impart to it, crediting the account of the Respondent for monies received from the MSA would be "expenditures determined appropriate by the State".

II

THE NEW HAMPSHIRE SUPREME COURT's RULING DID NOT MISCONSTRUE TITLE XIX OF THE SOCIAL SECURITY ACT.

42 U.S.C. § 1396b(d)(3)(B)(i) and (ii) may preclude a Federal Court from ordering a State to allocate monies received through the MSA to individual Medicaid recipients. It does not preclude a State Court from determining that such allocation constitutes "expenditures determined appropriate by the State". This is especially true when the recipient is not seeking a share in recovery "per se", but rather an order keeping the State from "double dipping". To interpret otherwise would bring into play "due process" issues as well as wrongful taking issues.

Medicaid, moreover, is administered by the States. They are required to pursue recovery, but such recovery needs to be prosecuted through general statutory rules and principles of common law. The recovery, which the petitioning State requests this Court to sanction, is nothing less

than a double recovery. A preclusion of unjust enrichment is certainly far from a misconstruction of the Social Security Act.

III

THE QUESTION PRESENTED DOES NOT APPEAR TO BE RECURRING NOR IMPORTANT AS TO FEDERAL LAW.

The Respondent is somewhat surprised in that the issue presented in the case "at bar" does not appear to be recurring. Other than this matter, the only other reported decision which appears to deal with the issue is the aforementioned Ninth Circuit decision in *Anderson v. Willden*, 314 F.3d 1004 (9th Cir. 2002), ironically, a case decided on the same day as the case "at bar".

Moreover, the case "at bar" involves the New Hampshire Supreme Court's interpretation of a State Statute to wit: RSA 167:14-a and general common law principles of subrogation. Accordingly, there is no real opportunity for this Court to offer a statement of law which will offer widespread assistance.

CONCLUSION

It is respectfully submitted that, for the reasons and authority cited above, the petition for a writ of "certiorari" should be denied.

Respectfully submitted,

JOHN P. MCGEE, JR.,
Counsel of Record
FLYNN & MCGEE, P.A.
222 Court Street
Portsmouth, NH 03801
(603) 436-5360

Attorney for Respondent

Dated: May 22, 2003